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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

NICHOLAS WAYNE MULLINS,

Defendant and Appellant.

D053563

(Super. Ct. No. SCE265773)

APPEAL from a judgment of the Superior Court of San Diego County, Peter Deddeh, Judge. Judgment affirmed as modified.

Nicholas Wayne Mullins pleaded guilty to one count of raping an unconscious person with the understanding that the trial court would dismiss the charge of sodomy of an unconscious person and impose probation. Mullins challenges his probation conditions imposed at sentencing, asserting the trial court erred when it imposed a residency restriction under Penal Code section 3003.5 because his crimes were committed before the law was enacted, and the condition bears no rational relation to his offense or to his risk of future

criminality. (Undesignated statutory references are to the Penal Code.) He also claims the probation condition that he not associate with any persons in possession of firearms or weapons is unconstitutionally vague and overbroad because the condition does not contain a knowledge requirement.

We reject Mullins's assertion that the trial court erred when it imposed the residency restriction under section 3003.5; however, we agree with his contention that the challenged probation condition should be modified to impose a knowledge requirement. As modified, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Sixteen-year-old Brittany M. had known Mullins, who was two years her senior, for almost two years and considered him to be like a brother. On the afternoon of March 13, 2005, Mullins and Carlos Garza visited Brittany at her home, and asked if she wanted to "hang out." The trio went to Mullins's house to talk, and then decided to go to Garza's home. Mullins and Garza spiked Britany's drink, and raped and sodomized her while she was unconscious.

The police were not able to locate and arrest Mullins until February 2, 2008. In June 2008, he pleaded guilty, and the trial court placed him on formal probation for five years and ordered him to serve 365 days in jail. The trial court also ordered various probation conditions, including that he not associate with any persons in possession of firearms or weapons. At a further sentencing hearing, the court concluded that the residency restriction in section 3003.5 applied to probationers, and over Mullins's objection, imposed the restriction.

Mullins timely appealed. We stayed this matter pending the Supreme Court's decision in *In re E.J.* (2010) 47 Cal.4th 1258 (*E.J.*). We thereafter requested and received further briefing from the parties addressing the impact of *E.J.* to the issues presented on appeal.

DISCUSSION

I. *Residency Restriction*

On November 7, 2006, California voters approved Proposition 83, commonly known as "Jessica's Law." The new law became effective November 8, 2006. (*People v. Shields* (2007) 155 Cal.App.4th 559, 562-563.) Among other things, Jessica's Law prohibits persons subject to mandatory sex offender registration under section 290 from residing within 2,000 feet of any school or park where children regularly gather. (§ 3003.5, subd. (b).)

As a condition of his probation, Mullins was required to register as a sex offender. Mullins asserts the trial court erroneously ordered him to comply with the residency restriction under Jessica's Law because (1) the statute must be construed to apply prospectively only and may not be applied to him, since his offense pre-dated the 2006 law; and (2) retroactive application of the statute would violate the state and federal ex post facto clauses.

Our Supreme Court recently held that the residency restriction did not violate ex post facto principles as it applies prospectively to parolees who have both been released on parole and moved into a restricted zone after Jessica's Law's 2006 effective date. (*E.J.*, *supra*, 47 Cal.4th at pp. 1272, 1279.) Specifically, the Supreme Court held "[f]or purposes of retroactivity analysis, the pivotal 'last act or event' [citation] that must occur before the mandatory residency restrictions come into play is the registered sex offender's securing of a

residence upon his release from custody on parole. If that 'last act or event' occurred subsequent to the effective date of section 3003.5(b), a conclusion that it was a violation of the registrant's parole does not constitute a 'retroactive' application of the statute." (*Id.* at p. 1274.)

Mullins acknowledges that the reasoning of *E.J.* appears to require rejection of his arguments, but sets them forth to preserve them for federal review. Although *E.J.* addressed the enforcement of residency restrictions as a condition of parole, the same analysis applies to probationers. Here, the court ordered the residency restriction in 2008, well after the effective date of Jessica's Law. Thus, the last act or event necessary to trigger application of the statute occurred after the statute's effective date. (*E.J.*, *supra*, 47 Cal.4th at p. 1273.) Accordingly, the residency restriction is not retroactive, and it does not violate the ex post facto provisions of the federal and state constitutions.

Mullins also contends that the residency restriction prohibiting him from residing within 2,000 feet of any school or park where children regularly gather is unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*) because it has no relationship to the crime he committed, is not reasonably related to his offense or his future criminality, and it infringed on his constitutional rights to travel and to freedom of association. We reject his contentions.

" 'When granting probation, courts have broad discretion to impose restrictive conditions to foster rehabilitation and to protect public safety. Penal Code section 1203.1 [permits] the court to impose . . . "reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, . . . and specifically for the reformation and

rehabilitation of the probationer." . . . ' [Citation.]" (*People v. Mason* (1971) 5 Cal.3d 759, 764, overruled on other grounds in *Lent, supra*, 15 Cal.3d at p. 486, fn. 1.) A probation condition "will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. . . . ' [Citation.]" (*Lent, supra*, 15 Cal.3d at p. 486.)

Here, the sentencing court did not have discretion with regard to the residency requirement. Mullins was required to register as a sex offender based on the crime he committed. (§§ 261, subd. (a)(4), 290, subd. (c).) In turn, the Legislature has determined that a registered sex offender cannot reside within 2,000 feet of any school or park where children regularly gather. (§ 3003.5, subd. (b).) We know of no authority applying the *Lent* criteria to a statutorily mandated probation condition.

In any event, assuming that the *Lent* criteria apply, we note that Mullins took advantage of his friendship with the minor victim to commit his crime. Accordingly, a danger exists that Mullins will take advantage of friendly relationships with minors developed in public places like a park. The condition limits such opportunities and is related to Mullins's potential future criminality. Thus, the condition serves the important state interests of public safety and rehabilitation.

Although Mullins does not claim that the residency restriction is constitutionally overbroad, he does assert that the condition infringes on his constitutional rights to travel and to freedom of association. Probation conditions that infringe upon recognized fundamental constitutional rights to travel, association and expression must also " 'be narrowly drawn; to

the extent it is overbroad it is *not* reasonably related to the compelling state interest in reformation and rehabilitation and is an unconstitutional restriction on the exercise of fundamental constitutional rights." ' ' " (*People v. Pointer* (1984) 151 Cal.App.3d 1128, 1139, citations omitted.) Here, the residency condition is statutorily mandated; thus, Mullins does not suggest how it could have been more narrowly drawn. Additionally, there is no evidence in the record allowing us to evaluate whether the statutory restriction substantially impinges on Mullins's constitutional rights, and whether the severity of the restriction is justified in furtherance of the statutory goal. Stated differently, based on the record before us, it is impossible to determine whether the infringement of Mullins's constitutional rights is unreasonable. Finally, we note that Mullins has not asked us to remand this case for rehearing. (See *E.J.*, *supra*, 47 Cal.4th pp. 1280-1284 [the superior court is in the best position to decide whether the residency restriction is an unreasonable condition that infringes on various state and federal constitutional rights].)

II. *Knowledge Element*

Mullins contends that the probation condition forbidding him from associating with persons in possession of firearms or weapons is unconstitutionally vague and overbroad because it does not contain a knowledge element. The Attorney General asserts that a knowledge requirement is implicit in the condition and that no modification is necessary. We agree with Mullins.

In *In re Sheena K.* (2007) 40 Cal.4th 875 (*Sheena K.*), our Supreme Court modified a probation condition requiring that a minor not associate with anyone disapproved of by her probation officer. (*Id.* at pp. 890-892.) The court found the condition unconstitutionally

vague without an express requirement that the minor have knowledge of the probation officer's disapproval. (*Ibid.*) We find this case to be similar.

To withstand a constitutional challenge based on vagueness apparent on the face of a probation condition, the condition " 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated.' " (*Sheena K., supra*, 40 Cal.4th at p. 890.) Here, in the absence of a knowledge requirement, Mullins must guess whom he must avoid because firearms and weapons are easily concealed; thus, he is not given fair warning of the conduct that might constitute a probation violation. Accordingly, we will modify the judgment to add an element of knowledge to probation condition number 12f.

DISPOSITION

The trial court is directed to modify the probation condition number 12f to read as follows: "Not knowingly associate with any persons who have firearms or weapons in their possession." As modified, the judgment is affirmed.

McINTYRE, J.

WE CONCUR:

NARES, Acting P. J.

HALLER, J.